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09/600,134	09/11/2000	Gerard Lang	05725.0654	8900

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EXAMINER

ELHILO, EISA B

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Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 25

Application Number: 09/600,134
Filing Date: September 11, 2000
Appellant(s): LANG ET AL.

Charles D. Niebylski
For Appellant

EXAMINER'S ANSWER

MAILED
AUG 28 2003
GROUP 1700

This is in response to the appeal brief filed June 09, 2003.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences, which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

No amendment after final has been filed.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The rejection of claims 22-58 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

US 5,769,903

Audousset et al.

6-1998

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 22-58 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aaslyng et al. (WO 97/19999) in view of Audousset et al. (US 5,769,903). This rejection is set forth in prior Office Action, Paper No. 16.

The primary reference of Aaslyng (US' 999) teaches a dyeing composition for keratinous hair. The dyeing composition comprises oxidation bases such as para-phenylenediamines (see page 9, line 24), para-aminophenols (see page 9, line 25), couplers such as meta-aminophenols and meta- diamines (see page 10, line 36), meta-diphenols such as 1,3-dihydroxybenzene (see page 11, line 6), from 0.001 to 0.01 mg of laccase enzymes derived from plant, animal, fungal, bacteria, biotech and microbial origins such as *Myceliophthora thermophula* (see page 6, lines 31-36) and *Polyporus pinsitus* (see page 8, lines 14-35). Aaslyng also teaches a method for dyeing hair comprising contacting a dyeing composition with the keratinous fibers under suitable conditions for a period of time sufficient to permit oxidation of the dye precursor into colored compound (see page 12, lines 1-13). The dyeing composition has a pH in the range from 3.0 to 9.0 (see page 8, lines 30-31). Regarding the amount of the dyeing ingredients, it would have been obvious to one having ordinary skill in the art at the time the invention was made to optimize the amounts of the dyeing ingredients in the dyeing composition so as to get the maximum effective amount because the reference teaches that the amounts of dye precursors and other ingredients

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used in the composition are in accordance with the usual commercial amounts (see page 8, lines 24-25).

The instant claims differ from the reference by reciting a multicompartment device or a kit for dyeing hair using dyeing method comprising the step of applying to the hair a dyeing composition that comprises dyeing ingredients such as a mixture of water, alcohol, acid addition salts, direct dye and additives.

Audousset et al. (US' 903) in analogous art teaches a hair dyeing composition comprising a medium which is suitable for dyeing made of water and organic solvent such as ethanol alcohol wherein the organic solvent presents in the amount of 1 to 40 % by weight of the total weight of the dyeing composition (see col. 9, lines 23-32), acid addition salts such as sulfates and tartrates (see col. 4, lines 45-48), additives such as surfactants (see col. 10, lines 1-9) and direct dye (see col. 9, line 65). Audousset also teaches a method for dyeing hair comprising the step of mixing the dyeing composition with oxidizing composition at the time of use then applying to the hair (see col. 10, lines 19-40). Audousset further, discloses a multicompartment device for dyeing hair (see col. 10, lines 62-67).

Therefore, in view of the teaching of the secondary reference, one having ordinary skill in the art would have been motivated to modify the primary reference by incorporating carriers such as water and organic solvents, direct dye and surfactants to make such a composition with multicompartment device as taught by audousset. Such modification would be obvious because one would expect that the use of water, organic solvents, direct dye and surfactants with a multicompartment device as taught by Audoussent would be similarly useful and applicable to the analogous composition taught by Aaslyng.

Response to Argument

The examiner has reviewed appellant's arguments and respectfully disagrees with the counsel's allegations. Specifically, appellant's argue that the examiner has failed to established a prima facie case of obviousness under 35 U.S.C. 103 of any of the claimed subject matter over Aaslyng in combination with Audousset.

The examiner position is such that the arguments are not found persuasive because of the following reasons.

In establishing a prima facie case of obviousness, three criteria must be met. See *in re Vaeck*, 947 F2d. 488, 20 USPQ 2d 1438 (Fed. Cir. 1991). First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. (see MPEP 2143).

In this case the three criteria have been met, because both references are in the analogous art of oxidative hair dyeing.

The primary reference of Aaslyng (WO' 999) teaches and discloses a dyeing solution comprising a number of dye precursors (oxidation bases) that includes the genus of para-aminophenol (see page 9, line 25) and modifiers (couplers), where in the composition the dye precursors may be used alone or in combination with other dye precursors (see page 10, lines 20-23). Aaslyng also, teaches the use of claimed enzyme laccase derived from different origins such as plant, fungal, bacteria and microbial origins (see page 6, lines 27-37), which generates hydrogen peroxide in the dyeing composition. Aaslyng further, teaches a dyeing composition in

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a solution form wherein the dyeing composition comprises acid addition salts such as phosphates (see page 13, lines 15-37 and page 14, lines 2-3).

Audousset et al. (US' 903) in analogous art of hair dyeing compositions, teaches an aqueous composition comprising p-aminophenols as a genus and the species of 3-methy-4-aminophenol (4-amino-3-methylphenol) as oxidation bases (see col. 6, lines 25-27), couplers (see col. 2, lines 7-15), a medium which is suitable for dyeing made of water (see col. 9, lines 23-24), acid addition salts such as sulfates and tartrates (see col. 4, lines 45-48) and oxidizing agents conventionally used for oxidation dyeing of keratin fibers, and among which mention may be made of hydrogen peroxide (see col. 10 lines 41-45) and, thus, a person of ordinary skill in the art would be motivated to combine the teachings of references because both references teach hair dyeing compositions comprising oxidation bases in the solution forms, couplers, conventional oxidizing agents which may be derived from chemical source or biological sources. Also, the skilled person in the art would further be motivated to select any of the species of the genus p-aminophenols that taught by the secondary reference of Audousset includes those of the claims, because an ordinary artisan would have the reasonable expectation that any of the species of the genus would have similar properties and thus, the same use as the genus as a whole. Audousset further, teaches that other oxidation bases and/or other couplers an/or the direct dyes are used in hair dyeing composition to modify the shades or to enrich them with glints (see col. 9, lines 63-67). Therefore, the combination is proper because the office action has clearly provided the bases of the combination. The primary reference clearly teaches the use of p-aminophenol and Audousset as a secondary reference does teach the use p-aminophenol and in particular the use of the claimed 4-amino-3- methylphenol.

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Accordingly, the Office maintains that the Examiner has met the burden to establish the prima face showing of obviousness. Viewed as a whole, the invention as claimed would have been obvious to one of ordinary skill in the art at the time of the invention.

Finally, the Examiner request that this Board when viewing the evidence as a whole, and lacking any secondary indicia of nonobviousness, affirm the decision of the Examiner in whole.

For the above reasons, it is believed that the rejections should be sustained.



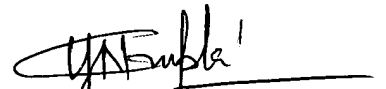
Eisa Elhilo
August 23, 2003

Conferees

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Respectfully submitted,


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